A

Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(NCVC)(A)-394–08 OF 2020
ABDUL KARIM, ABU BAKAR AND SUPANG LIAN JJCA
17 DECEMBER 2020

C

Administrative Law — Judicial review — Application for — Decision by first respondent to dissolve Sabah State Legislative Assembly ('SLA') — High Court dismissed application — Appeal against decision — Whether act of issuing the proclamation and dissolving SLA by first respondent was justiciable and within jurisdiction of the High Court for submission, deliberation and eventual decision

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This was an appeal against the decision of the High Court delivered by the learned judicial commissioner ('JC') who dismissed the application by the appellants for leave of the judicial review. On 29 July 2020, the second respondent acting as the then chief minister of Sabah wrote to the first respondent acting as Yang di-Pertua Negeri ('YDPN'), requesting the latter to issue a proclamation for the dissolution of the 15th Sabah State Legislative Assembly ('SLA'). On 30 July 2020, the first respondent agreed to the request and signed and issued the proclamation of the dissolution of SLA ('the proclamation'). On the same date, the proclamation was *gazetted*. The appellants applied at the High Court for leave for judicial review essentially to quash the decision of the first respondent to dissolve the SLA and the proclamation. The JC dismissed the application and hence this appeal. The issue for consideration was whether the act of issuing the proclamation and dissolving the SLA by the first respondent was justiciable and within the jurisdiction of the High Court for submission, deliberation and eventual decision.

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Held, dismissing the appeal:

(1) It was a remiss and too simplistic an approach to just determine that the proclamation and dissolution per se were not justiciable, without looking at the legality of actions done by the first and second respondents prior to the proclamation and dissolution. The legality of the actions leading up to the proclamation and dissolution must be determined. The legality of the proclamation and the dissolution itself must also be decided. Hence, it was inevitable that the learned JC had alluded to the relevant provisions of the Sabah Constitution to determine these matters. It was therefore incorrect for the appellants to submit that this should not be done by the

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learned JC at the leave stage for judicial review. The legality of the two parts was so connected and overlapped each other. Before coming to the decision that the proclamation and dissolution of the SLA was not justiciable, the learned JC had also correctly approached that issue by explaining there were matters that were always not justiciable before the courts (see paras 58–60 & 65).

(2) Even though the provisions of the Sabah Constitution could be argued, litigated and determined for its effect and applicability in relation to this appeal, this still would not assist the appellants in their argument because at the end of the day, a dissolution of a state assembly was a non-justiciable subject and consequently not amenable for judicial review (see para 86).

(3) There were questions and issues in this appeal that could not be simply put aside by saying the same were not justiciable. However, the proclamation and dissolution of the SLA was not justiciable as explained earlier. Even though the appellants had raised other issues which were justiciable, the core issue remains a non-justiciable subject (see paras 91 & 94).

(4) The proclamation and dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. The first, second and the fourth respondents, were the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. They would be in a much better position compared to the courts in making the call for the end of term for the SLA. The dynamics of politics were within their better grasps than the courts in deciding this (see para 98).

(5) As already pointed out, the issue of the proclamation and dissolution of the SLA in itself could not be justiciable for determination. And in this regard, the learned JC was entitled to dismiss the application for judicial review even at the leave stage (see para 102).

(6) The title of the letter was in reference to the dissolution of the SLA. The third paragraph of the letter was in the form of an advice regarding the unstable political situation in Sabah that warranted the dissolution as reflected in the fourth paragraph of the letter. The letter was both a request and an advice from the second respondent to the first respondent in respect of the dissolution of the SLA. Although the letter made reference to a non-existent provision of the Sabah Constitution, this was not fatal and had not affected the request for the dissolution of the SLA. Under the principles of constitutional law and general law, it was the substance of the letter or document that matters and not its form (see paras 106–109).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang disampaikan oleh pesuruhjaya kehakiman yang bijaksana ('PK') yang menolak permohonan perayu untuk kebenaran semakan kehakiman. Pada 29 Julai 2020, responden kedua yang bertindak sebagai Ketua Menteri Sabah ketika itu menulis surat kepada responden pertama yang bertindak sebagai Yang di-Pertua Negeri ('YDPN'), meminta responden pertama untuk mengeluarkan pengisytiharan untuk pembubaran Dewan Undangan Negeri Sabah ke-15 ('SLA'). Pada 30 Julai 2020, responden pertama setuju kepada permintaan tersebut dan menandatangani serta mengeluarkan pengisytiharan pembubaran SLA ('pengisytiharan'). Pada tarikh yang sama, pengisytiharan tersebut diwartakan. Perayu-perayu memohon di Mahkamah Tinggi untuk kebenaran semakan kehakiman pada dasarnya untuk membatalkan keputusan responden pertama untuk membubarkan SLA dan pengisytiharan. JC menolak permohonan itu dan oleh itu rayuan ini. Isu untuk dipertimbangkan adalah sama ada tindakan mengeluarkan pengisytiharan dan membubarkan SLA oleh responden pertama adalah wajar dan berada di dalam bidang kuasa Mahkamah Tinggi untuk hujahan, pertimbangan dan keputusan akhirnya.

Diputuskan, rayuan ditolak:

(1) Ini adalah ketinggalan dan terlalu ringkas pendekatan untuk menentukan bahawa pengisytiharan dan pembubaran dalam diri tidak boleh diadili, tanpa melihat kesahan tindakan yang dilakukan oleh responden pertama dan kedua sebelum pengisytiharan dan pembubaran. Kesahan tindakan yang menjurus ke pengisytiharan dan pembubaran mesti ditentukan. Kesahan pengisytiharan dan pembubaran sendiri juga harus ditentukan. Oleh itu, ia tidak dapat dielakkan bahawa PK yang bijaksana telah merujuk peruntukan Perlembagaan Sabah yang berkaitan untuk menentukan perkara-perkara tersebut. Oleh itu, ia adalah tidak betul bagi perayu-perayu untuk mengemukakan bahawa ini tidak boleh dilakukan oleh PK yang bijaksana pada peringkat kebenaran untuk semakan kehakiman. Kesahan kedua-dua bahagian adalah saling berkaitan dan berkenaan. Sebelum membuat keputusan bahawa pengisytiharan dan pembubaran SLA adalah tidak dibenarkan, PK yang bijaksana juga betul dalam mengendalikan isu tersebut dengan menjelaskan bahawa perkara-perkara bukan sentiasa boleh diadili di hadapan mahkamah (lihat perenggan 58–60 & 65).

(2) Walaupun peruntukan-peruntukan dalam Perlembagaan Sabah dapat dihujah, diadili dan ditentukan atas kesan dan keberlangsungannya sehubungan rayuan ini, ini tetap tidak membantu perayu-perayu dalam hujahan mereka kerana pada akhirnya, pembubaran dewan undangan negeri adalah subjek yang tidak boleh diadili dan akibatnya tidak boleh dipertikaikan oleh mahkamah (lihat perenggan 86).

(3) Dalam rayuan ini terdapat soalan dan isu yang tidak dapat diketepikan dengan mengatakan bahawa hal tersebut tidak boleh diadili. Walau bagaimanapun, pengisytiharan dan pembubaran SLA tidak boleh diadili seperti yang dijelaskan sebelumnya. Walaupun perayu telah mengemukakan isu-isu lain yang boleh diadili, isu utama tetap satu subjek yang tidak boleh diadili (lihat perenggan 91 & 94).

(4) Pengisytiharan dan pembubaran SLA harus dianggap sebagai perkara eksklusif dalam bidang badan eksekutif atau perundangan yang tidak boleh diceroboh oleh badan kehakiman. Responden pertama, kedua dan keempat, adalah orang dan badan yang paling sesuai untuk memutuskan berada di bawah apa keadaan dan pada masa apa harus pengisytiharan dan pembubaran SLA dilakukan. Mereka akan berada dalam posisi yang jauh lebih baik dibandingkan dengan mahkamah dalam membuat tuntutan untuk berakhirnya terma SLA. Dinamik politik berada lebih baik dalam genggaman mereka daripada mahkamah dalam memutuskan hal ini (lihat perenggan 98).

(5) Seperti yang dijelaskan, isu pengisytiharan dan pembubaran SLA dalam diri tidak boleh diadili untuk ditentukan. Dan dalam hal ini, PK yang bijaksana adalah berhak menolakkan permohonan semakan kehakiman walaupun pada peringkat kebenaran (lihat perenggan 102).

(6) Judul surat merujuk kepada pembubaran SLA. Perenggan ketiga surat itu adalah berbentuk nasihat mengenai situasi politik yang tidak stabil di Sabah yang memerlukan pembubaran seperti yang dinyatakan dalam perenggan keempat surat itu. Surat itu adalah permintaan dan nasihat dari responden kedua kepada responden pertama berkenaan dengan pembubaran SLA. Walaupun surat itu merujuk kepada ketentuan Perlembagaan Sabah yang tidak wujud, ini tidak memudaratkan dan tidak mempengaruhi permintaan pembubaran SLA. Di bawah prinsip-prinsip undang-undang perlembagaan dan undang-undang umum, kepentingan adalah kandungan surat atau dokumen bukan bentuknya (lihat perenggan 106–109).]

Cases referred to

Black v Canada (Prime Minister) 2001 CanLII 8537, CA (refd)

Civil Aeronautics Administration v Singapore Airlines Ltd [2004] 1 SLR 570, CA (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (folld)

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285; [2010] 2 CLJ 925, FC (folld)

Datuk Mohd Zaid bin Ibrahim v Peguam Negara Malaysia [2017] 9 MLJ 502, HC (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (folld)
Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (folld)
Juraimi bin Husin v Pardons Board, State Of Pahang & Ors [2002] 4 MLJ 529, FC (folld)
Khairuddin bin Abu Hassan v Tan Sri Mohamed Apandi Ali (sued in his capacity as the appointed 'Attorney General') [2017] 9 MLJ 441, HC (refd)
Lee Hsien Loong v Review Publishing Co Ltd & Anor and another suit [2007] SGHC 24, HC (refd)
Long bin Samat & Ors v Public Prosecutor [1974] 2 MLJ 152, FC (refd)
N Mani v Sangeethan Theatre & Ors [2004] 12 SCC 278, SC (refd)
Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68; [1983] 1 CLJ 130, FC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41; [2020] AC 373, SC (distd)
Sampanthan & Ors v Attorney General & Ors [2019] 5 LRC 29, SC (distd)
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Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60, CA (refd)
Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50, PC (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2017] 4 MLJ 521, CA (refd)
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128, HC (refd)
Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di- Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan [1986] 2 MLJ 391 (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253, FC (refd)

Legislation referred to

Federal Constitution arts 72(1), 113(1), 145(3)
Perak State Constitution art XXXVI(2)
Sabah Constitution arts 6(3), 7(1), 10, 10(1), (1A), (2), (2)(b), (3), (4), 14(1)(c), 21(2)
Constitution of Sri Lanka art 70(1)

Appeal from: Judicial Review No BKI-13NCVC-19/8 of 2020 (High Court, Kota Kinabalu)

Firoz Hussein Ahmad Jamaluddin (Tengku Fuad Tengku Ahmad and Wilson Chang with him) (FT Ahmad & Co) for the appellants.
Brenndon Keith Soh (Dayangku Fazidah Hatun bt Pg Bagul and Chee Chun Yen with him) (Sabah Attorney General's Chambers) for the first respondent.
Cyrus Das (Chung Jiun Dau with him) (Chung & Assoc) for the second and fourth respondents.
Suzana Atan (Narkunavathy Sundareson with her) (Senior Federal Counsel, Attorney General's Chambers) for the third respondent.

Abu Bakar JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court on 21 August 2020 delivered by the learned judicial commissioner ('JC') who dismissed the application by the appellants for leave of the judicial review. This application involves largely a challenge against the decision made by the first respondent on the request of the second respondent for the dissolution of the 15th Sabah State Legislative Assembly ('SLA') on 30 July 2020.

[2] The application emanated from the uncertain and tumultuous political situation that debased the orderly administration of the state of Sabah not long after the convening of that SLA.

[3] In deciding this appeal, this court will among others address the issue of what is justiciable before the High Court and this court. Also of greater importance to be discussed is whether the ultimate issue in this case in itself is not justiciable. The relevant provisions of the Sabah Constitution and certain common law principles will also be highlighted. This is undertaken to determine the propriety of the actions of the first and second respondents, towards dissolving the SLA.

[4] In view of the dynamics of Sabah's politics, rapid and successive events have ensued since we decided this present appeal. Among others, roughly two

weeks after we gave our decision on the appeal, a state election had been concluded in Sabah and a newly minted chief minister has been appointed. Nonetheless, the focus of the present appeal is the dissolution of the SLA just before that state election.

THE PARTIES

[5] The first appellant is a former chief minister of Sabah. He in fact filed another action by originating summons ('OS') where the effect of this claim among others is that he had never ceased from being the lawful chief minister. For the present case, he at all material times also claimed to be entitled to be appointed as the chief minister again. The other appellants were all Sabah State Assemblymen before the dissolution of the SLA and supported the first appellant to be appointed as the chief minister.

[6] The first respondent is the head of state and governor of Sabah and under the Sabah Constitution is known as the Yang di-Pertua Negeri ('YDPN').

[7] The second respondent before the dissolution of the SLA was the chief minister of Sabah and with the said dissolution, at all material times, the caretaker chief minister.

[8] The third respondent is the election commission and under art 113(1) of the Federal Constitution is vested with the power to conduct elections to the House of Representatives and legislative assemblies of the states.

[9] The fourth respondent is the Government of the State of Sabah.

BACKGROUND FACTS

[10] On 29 July 2020, the second respondent acting as the then chief minister of Sabah wrote to the first respondent acting as YDPN, requesting the latter to issue a proclamation for the dissolution of the SLA. On 30 July 2020 the first respondent agreed to the request and signed and issued the proclamation of the dissolution of SLA ('proclamation'). On the same date, the proclamation was *gazetted* and the third respondent, the election commission was informed of the same.

[11] Having been notified of the proclamation, the third respondent, set the mechanism moving for a state election of representatives of the next SLA. Towards this objective, the third respondent set 12 September 2020 as the nomination date for the state election. This date happens to be five days after

this panel of the Court of Appeal first heard the present appeal on 7 September 2020. The third respondent also fixed the date for the state election on 26 September 2020.

[12] The appellants applied at the High Court for leave for judicial review essentially to quash the decision of the first respondent to dissolve the SLA and the proclamation. Declarations were also requested by the appellants in this application for leave, arising from the said dissolution of the SLA and the proclamation. More on this is seen in the reliefs requested in the application for leave of the judicial review and these are as follows:

(a) a declaration that the written request by the second respondent to the first respondent on 29 July 2020 to dissolve the 15th SLA was incapable of causing the dissolution of the same as it was ultra vires the Sabah Constitution;

(b) a declaration that the second respondent's position as chief minister was vacated pursuant to art 7(1) of the Sabah Constitution following his written request dated 29 July 2020 to the first respondent for the dissolution of the SLA purportedly pursuant to art 10(1)(2)(b) (as incorrectly cited by the second respondent) of the same;

(c) in the alternative, a declaration that the second respondent's position as chief minister was deemed to have been vacated pursuant to art 7(1) of the Sabah Constitution as soon as the first respondent was given notice that the second respondent had lost the confidence of the majority of the members of the SLA which occurred on 29 July 2020;

(d) a declaration that following the vacation of the second respondent's position as chief minister, the first respondent was under a duty to exercise his discretion as to whether to withhold consent to the request for dissolution or appoint a member of the SLA pursuant to art 6(3) of the Sabah Constitution who in his judgement is likely to command the confidence of a majority of the members of the SLA;

(e) a declaration that the first respondent breached his constitutional duty by failing to exercise his discretion, as provided under art 10(2) of the Sabah Constitution, to consider whether to appoint a member of the SLA pursuant to art 6(3) of the Sabah Constitution who in his judgement is likely to command the confidence of a majority of the members of the SLA;

(f) a declaration that the proclamation by the first respondent dated 30 July 2020 (No DUNS [R]100–52/8(60)) for the dissolution of the 15th SLA purportedly under art 21(2) of the Sabah Constitution and the purported dissolution of the 15th SLA was ultra vires the Sabah Constitution and void ab initio;

(g) an order of certiorari quashing the second respondent's written request to the first respondent on 29 July 2020 with immediate effect;

(h) an order of certiorari quashing the proclamation with immediate effect; and

(i) an order of certiorari quashing the Sabah State Government *Gazette* dated 30 July 2020 (Vol LXXV No 30).

ANOTHER ACTION

[13] As indicated earlier, there is another distinct action by way of another OS filed by the first appellant against the first and second respondents. This OS is a separate action filed and not strictly connected to the present case of requesting leave to apply for judicial review.

[14] This OS is in relation to the dispute arising from the appointment of the second respondent, replacing the first appellant as Sabah chief minister, by the first respondent. In essence, it is about who has the legal right to be the Sabah chief minister as between the first appellant and the second respondent. On 26 August 2020, 11 days before the present appeal was first heard, the Federal Court granted the first appellant leave to appeal for this OS. The appeal for this OS is now before the Federal Court for hearing.

[15] Although this OS has no direct bearing on the present appeal before this court, nonetheless it is highlighted because the effect of the Federal Court's decision in granting leave to appeal for this OS is that the operation of some provisions of the Sabah Constitution, which are similarly referred before this court, are indeed justiciable. More of this will be alluded to in the course of this judgment.

THE HIGH COURT'S DECISION

[16] At the High Court, the learned JC in addressing the application, highlighted the principles regarding leave for judicial review as follows:

(a) the applicants for leave of the judicial review must at least show an arguable case;

(b) nonetheless, at the leave stage, the merits of the application for judicial review itself generally should not be put under scrutiny;

(c) at the leave stage what is needed to be shown is that the case is not frivolous;

(d) however, the application for leave will be refused if the applicants do not have the locus standi or were out of time in applying for it; and

(e) the application will also be denied if the judicial review is directed against a party protected from the same and the subject matter for the judicial review is non-justiciable.

[17] At para [7] of the learned JC's grounds of judgment ('GOJ'), the learned JC identified the main issue to be decided in this case was whether the dissolution of the SLA is a subject justiciable at the High Court.

[18] At para [11] of the GOJ the learned JC said that this case substantially involves the interpretation of the Sabah Constitution.

[19] Hence, the learned JC highlighted some salient principles regarding the interpretation of a constitution. These include that a constitution should be interpreted broadly and not in a pedantic fashion as it is a living legislation. Also in interpreting the same, judicial precedents play a lesser part than the normal statutory interpretations and though respect must be given to the language used in a constitution, it should nonetheless be interpreted with less rigidity and more generosity. Also a constitution should not be interpreted using the canons of construction for normal legislation in the fields of substantive criminal or civil law. Further, a constitution should be interpreted in a way that the whole provisions of the same are recognised and to give effect to them whenever possible.

[20] The learned JC also dealt with the issue of locus standi of the appellants in applying for judicial review. The learned JC was of the view that the appellants being state assemblymen of Sabah, were affected by the proclamation. They have a real interest in the matter and therefore had the requisite locus standi in seeking redress from the court.

[21] The learned JC also found that under the Sabah Constitution, the second respondent could request for the dissolution of the SLA. And the first respondent, the YDPN, has the absolute discretion also under the Sabah Constitution to dissolve the same.

[22] Further, the learned JC examined the letter from the second respondent to the first respondent to dissolve the SLA. Although the letter made reference to a non-existent provision of the Sabah Constitution, the learned JC was of the opinion and finding that the substance of the letter must be taken into account instead of the form. In this regard, the learned JC found that the said letter was both a written request and advice from the second respondent to the first respondent that the SLA be dissolved. The learned JC found the letter was sufficient for the first respondent to dissolve the SLA under the Sabah Constitution.

[23] On the crux of the matter, the learned JC essentially found that the application could not be granted largely on the ground that the dissolution of the SLA was a matter not justiciable before the courts and not amenable for judicial review. This basically means the High Court, as decided by the learned JC, was not in a position to come to a determination on the dispute arising from the dissolution of the SLA as it concerns a subject not to be litigated.

[24] Although it was acknowledged by the High Court that the application for judicial review was only at the leave stage and not the substantive stage, the learned JC was of the view that since the application is not justiciable, the same could be dismissed even at the leave stage.

RELEVANT PROVISIONS OF THE SABAH CONSITUTION

[25] In appreciating the arguments in the present appeal, some provisions of the Sabah Constitution will be discussed and highlighted in the course of this judgment. These provisions are the basis for the actions taken in respect of issuing the proclamation and dissolution of the SLA and pertain also to the appellants' contentions that the matters raised are justiciable, especially in light of the leave to appeal by the Federal Court given in respect of the OS.

SUMMARY OF THE APPELLANTS' CONTENTIONS

[26] The appellants' written submission states that the principal issue in application for judicial review on the ground that the same is not justiciable.

[27] In deciding it is not justiciable, the learned JC erred in not recognising the courts' role to ensure the lawful exercise of the constitutional powers especially vested in both the first and second respondents. The powers conferred by the Sabah Constitution in respect of the actions taken to dissolve the SLA are matters within the jurisdiction of the courts to decide and therefore justiciable. Hence, the appellants urged this court to allow the appeal and grant leave for the judicial review for full arguments at the substantive stage of the judicial review.

[28] In obtaining leave to appeal on the OS matters from the Federal Court, the apex court had allowed several questions of law to be argued. In allowing those questions of law, the Federal Court did not view the matters as not justiciable. These matters had direct relevance to the present appeal as it concern the status of the second respondent in requesting the dissolution of the SLA from the first respondent and the role and capacity of the first respondent in agreeing to the dissolution. These questions of law now before the Federal Court are as follows:

(i) whether art 7(1), read with art 10(4) and art 10(2) of the Sabah

Constitution, confers a discretion on the YDPN to:

(a) determine whether a validly appointed chief minister ceases to command the confidence of the majority of the members of the legislative assembly; and/or

(b) dismiss a validly appointed chief minister?

(ii) if the answer to question (i) is in the affirmative, the Court of Appeal erred in law and fact in failing to determine whether such discretion is only exercisable by the YDPN upon a concession by the chief minister that he has ceased to command the confidence of the majority of the members of the legislative assembly;

(iii) if the answer to question (i) is in the affirmative, the Court of Appeal erred in law and fact in failing to determine whether such discretion is only exercisable by the YDPN if the chief minister has first been given an opportunity to request a dissolution of the legislative assembly under art 7(1) of the Sabah Constitution.

Whether in the absence of a concession or a request for dissolution, a vote of no confidence in the Legislative Assembly is nonetheless required, as it was in *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187; [1966] 1 LNS 186, before the YDPN can treat the chief minister as having resigned under art 7(1) of the Sabah Constitution;

(iv) whether a vote of confidence, as opposed to a vote of no confidence, in the legislative assembly for the purported new chief minister is constitutional pursuant to art 6(3) of the Sabah Constitution;

(v) whether an invalid/unlawful appointment of a chief minister under art 6(3) of the Sabah Constitution can be legitimised through a subsequent show of confidence by the majority of members of the legislative assembly;

(vi) whether the YDPN has properly exercised his constitutional discretion pursuant to art 14(1)(c) read with art 10 of the Sabah Constitution in failing and/or refusing to appoint the nominated members selected by the then validly appointed chief minister;

(vii) whether in determining that the chief minister has ceased to command the confidence of a majority of the members of the legislative assembly as provided in art 7(1) of the Sabah Constitution and for fulfilling the test laid down in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925, is it necessary that the loss of confidence is properly established when either:

(a) the YDPN has been informed by the chief minister that he ceases to

command the confidence of a majority of the members of the legislative assembly; or

(b) the YDPN has incontrovertible evidence of the votes of a majority of members of the legislative assembly that the Chief Minster no longer enjoys the support of the aforesaid; or

(c) both of the foregoing.

(viii) whether a change in support of a small number of members who were part of the previous majority of members of the legislative assembly is sufficient evidence that a chief minister has ceased to command the confidence of a majority of members where the majority as a whole had not been consulted; and

(ix) whether the decision in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* is no longer good law because the Federal Court did not decline to determine the said appeal on the basis that the appeal was 'academic' notwithstanding the fact that the appellant in that case no longer had a majority in the legislative assembly.

[29] In dissolving the SLA, there is a need to comply with the relevant provisions of the Sabah Constitution. In deciding whether there is a compliance of the same, the courts will not need to second guess the choice of the executive decision makers. The courts are only to decide whether the decision makers had complied with the relevant laws. This is within the province of the courts to determine and therefore it is justiciable.

[30] Matters not justiciable before the courts have diminished over the years. These include aspects of national security, the conduct of international relations and pure political and economic decisions. Courts always have wide discretion to decide on judicial review affecting the actions of the executive and public bodies. Every official action under the realm of public authorities must be reviewable by judicial review on account of illegality, irrationality and procedural impropriety.

[31] The courts are always within jurisdiction when it is called to determine a pure question of law or fact that governs the lawfulness of what has been done. In cases where this is the issue before the courts, the matter is always justiciable. The interpretation to the provisions of the Sabah Constitution for instance in this case, is always open before the courts for deliberation and decision.

[32] There are case law to suggest issue of non-justiciability has cropped up when the executive acts allegedly done under State Constitutions are being

challenged in courts. Yet these cases have gone on to determine whether such acts were constitutionally undertaken and not simply rule that such challenges were not justiciable.

[33] What is sought by the appellants' judicial review is whether the first respondent acted in accordance with the Sabah Constitution in dissolving the SLA. This is justiciable before the courts as supported by the case laws. In this regard, the relevant provisions of the Sabah Constitution must be considered to see and determine whether the first respondent acted constitutionally in dissolving the SLA.

[34] The learned JC erred in addressing the constitutionality of the actions of the first respondent to issue the Proclamation and dissolving the SLA when this should not be decided at the leave stage for judicial review. The learned JC ran foul against the law that at the leave stage what is required is for the appellants to show an arguable case.

SUMMARY OF THE FIRST RESPONDENT'S CONTENTIONS

[35] The letter from the second respondent to the first respondent asking for the dissolution of SLA is both a request and advice from the second respondent to the first respondent for the said dissolution of the SLA. In that sense the provisions of the Sabah Constitution have been complied with for the dissolution of the SLA to take effect.

[36] The dissolution of the SLA is not justiciable. A matter can be non-justiciable when the courts do not have the competence to decide the same and where constitutional, common or statutory laws insulate the subject matter before the courts from being litigated and decided.

[37] Even at the leave stage, the courts are within its power to decide that a matter is not justiciable. There is no purpose for the matter to be allowed to be argued at the substantive stage if the same is not justiciable in the first place.

[38] The subject matter of prerogative powers such as defence of the realm and dissolution of parliament are not amenable for judicial inspection and are not justiciable.

[39] The first respondent is vested with the sole discretion under the Sabah Constitution to dissolve the SLA. The first respondent need not decide that the second respondent has lost the majority support before dissolving the SLA. In this regard the first appellant is not entitled to assume that under the Sabah Constitution he has a right to be appointed as the chief minister when there is a sitting chief minister.

[40] Since the decision to dissolve the SLA by the first respondent is not justiciable, the decision making process is also not justiciable. That would mean the request and whether there was or was not advice given to the first respondent to dissolve the SLA are also not justiciable.

[41] The discretion given to the first respondent to declare the dissolution of the SLA is akin to the power given to the Attorney General under the Federal Constitution in respect of initiating, continuing and withdrawing criminal charges against anyone. Therefore this discretion is not justiciable before the courts.

SUMMARY OF THE SECOND AND FOURTH RESPONDENTS' CONTENTIONS

[42] The summary of the second and fourth respondents' arguments is taken together as both are represented by the same counsel.

[43] The second and fourth respondents submitted that the subject matter of the leave for judicial review as applied by the appellants is non-justiciable. The learned JC was correct to find that the dissolution of the SLA as proclaimed could not and should not be litigated and decided by the High Court.

[44] Even at the leave stage for judicial review, the High Court could decide that the dissolution of the SLA is not a justiciable subject to be questioned. There is no obligation to allow for the dispute to be litigated at the substantive stage for judicial review by giving leave as applied for by the appellants.

[45] When it comes to the justiciability of a matter, there is no need to consider the process of how the decision was arrived at but only to determine whether the decision impugned itself is justiciable.

[46] The constitutional powers granted to any head of state are not justiciable. In this case, the powers granted by the Sabah Constitution to the first respondent as the head of state of Sabah to dissolve the SLA should not be a subject to be litigated and determined by the courts.

[47] The provisions of the Sabah Constitution and other state constitutions are similar to the Federal Constitution in giving the power to the head of state for the dissolution of the states assemblies and to the parliament in respect of such dissolution.

[48] There are case law to support the proposition that the power given to the first respondent as the YDPN to dissolve the SLA is not justiciable.

[49] The letter sent by the second respondent to the first respondent was in any event related to the dissolution of the SLA. The imperfection in the said letter does not distract from the fact that it was for the dissolution of the same. The typographical error could not defeat substance over form with respect to the letter. There are case law asserting the principle that a document should be viewed and considered for substance rather than form. Also a provision of the law may be incorrectly cited but an action could still not be vitiated as long as the power to take that action still exist and could be traced to the correct law.

[50] The dissolution of the SLA had set the process moving for a state election. It is too late now for the appellants to reverse the events that had transpired since the said dissolution.

SUMMARY OF THE THIRD RESPONDENT'S CONTENTIONS

[51] The subject matter for the application for leave for judicial review is not justiciable.

[52] The provisions of the Sabah Constitution permit the second respondent to request the dissolution of the SLA and the first respondent too is vested with the discretion under the Sabah Constitution to dissolve the same.

[53] The learned JC was correct to find that the letter was both a request and advice for the dissolution of the SLA. The learned JC was also right to find that the first respondent has absolute discretion either to dissolve the SLA or withhold the request for such dissolution.

OUR ANALYSIS AND DECISION

Justiciability

[54] The central issue regarding the leave for judicial review before the High Court and consequently in this appeal, is whether the act of issuing the proclamation and dissolving the SLA by the first respondent is justiciable and within the jurisdiction of the High Court for submission, deliberation and eventual decision. It is to be noted that acts of issuing the proclamation and dissolving the SLA are the end result that are being challenged by the appellants, although the legality towards taking the actions are also being questioned by the appellants. It may have involved a series of prior actions involving primarily the first and second respondents, before and leading up to the proclamation and the dissolving of the SLA but what concerns the appellants mainly are that specific twin actions of the first respondent in issuing the proclamation and dissolving of the SLA.

[55] In this regard, we note the arguments of the appellants that what they are seeking essentially is the determination whether the proclamation issued and the dissolving of the SLA are in accordance with the Sabah Constitution. And these they contend are always justiciable before the courts. In fact, learned counsel for the appellants during oral submission, started by saying that the appellants are not questioning the discretion of the first respondent acting as the YDPN but requesting the interpretations of certain provisions of the Sabah Constitution in determining whether the proclamation and dissolution of the SLA are constitutional.

[56] It may not seem apparent and we intend to show there are two interrelated parts to that argument. They are as follows:

(a) the legality of the actions of both the first and second respondents prior to the proclamation and dissolution of the SLA; and

(b) the legality of the proclamation and the dissolution of the SLA itself.

[57] In both, the legality of the actions are considered in reference to specific provisions of the Sabah Constitution as mentioned earlier.

[58] It is important to highlight the two interrelated parts because the justiciability of the proclamation and dissolution of the SLA itself cannot be brought to point without considering the legality of the actions of the first and second respondents prior to and leading up to the said proclamation and dissolution. In other words, before the proclamation and dissolution of the SLA can be said to be non-justiciable, the legality of actions leading up to the two matters must also be determined. In our view, it is a remiss and too simplistic an approach to just determine that the proclamation and dissolution per se are not justiciable, without looking at the legality of actions done by the first and second respondents prior to the proclamation and dissolution. Also required is the determination by the courts (both here and below) on the justiciability of the proclamation and dissolution itself. This is because the actions in the first part are analogous and related to the actions in the second part.

[59] Thus, both the learned JC at the High Court and we deciding the appeal at the appellate stage, could not and must not simply make the decision that the dissolution of a state assembly is pure and simple non-justiciable. Before arriving at the decision that it is non-justiciable, it is inevitable that the legality of the actions leading up to the proclamation and dissolution must be determined. The legality of the proclamation and the dissolution itself must also be decided. Hence, it is inevitable that the learned JC had alluded to the relevant provisions of the Sabah Constitution to determine these matters.

[60] In fact, both the appellants and all the respondents alluded to this aspect in their oral submissions before us in this court. The matter was also correctly addressed and highlighted in the learned JC's GOJ. It is therefore with respect, incorrect for the appellants to submit that this should not be done by the learned JC at the leave stage for judicial review. The legality of the two parts is so connected and over lapped each other. Therefore those issues apart from the proclamation and dissolution of the SLA, must not be litigated only at the substantive stage of the judicial review.

[61] After all in the Supreme Court case of *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41; [2020] AC 373 it is said as follows:

> ... it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. *The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.* (Emphasis added.)

[62] More so when we consider our own Court of Appeal case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2017] 4 MLJ 521 where the following was said:

> ... the courts have a constitutional duty to check all forms of executive decision by way of judicial review when it infringes on the right of public or the constitution ...
>
> ...
>
> ... arbitrariness in any decision making process whether by executive or judiciary is an affront to the rule of law and the constitution. In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* ... HRH Raja Azlan Shah (CJ Malaya ...) had anchored the jurisprudence for judicial review in immutable terms by asserting that 'unfettered discretion is a contradiction in terms, and every legal power must have its limits, otherwise there is dictatorship ...'.

[63] Therefore, the submission by the second and fourth respondents that there is no need to consider the process of how the decision was arrived at but only to determine whether the decision impugned itself is justiciable, with respect, is not consistent with the closely knitted two parts that we have highlighted.

[64] However, it must always be borne in mind that in any event, the learned JC found that the proclamation and dissolution of the SLA itself are not justiciable. Hence even if the learned JC had gone to some length in addressing

the legality of the events prior to the dissolution, the learned JC is not legally wrong to find that the end result itself is a subject that is not justiciable.

[65] Before coming to the decision that the proclamation and dissolution of the SLA is not justiciable, the learned JC had also correctly approached that issue by explaining there are matters that are always not justiciable before the courts.

[66] In this regard, the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128 is relevant where Mohamad Arif J (as he then was) defined and dealt with the concept of justiciability as follows:

> The Concept of Justiciability Justiciability relates to the sixth ground stated above — whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374; [1984] 3 All ER 935, per Lord Roskill. Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.
>
> The learned authors of Durga Das Basu's *Human Rights in Constitutional Law* (2nd Ed), Reprint 2005 observe with deserving scholarship as follows:
>
> > Limits of Judicial Review of Executive Acts
> >
> > Even where it appears prima facie that some fundamental right has been violated by an Executive Act, the court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions.
> >
> > Non-justiciable Issues
> >
> > In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a court of law, because the issue involved is not justiciable.
> >
> > ... The most prominent amongst non-justiciable issues are those which are known in the USA as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).
>
> The learned authors of De Smith's *Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the court

acknowledges that the litigation process and the expertise of the court are unsuited to resolving the question in hand' (at p 121). A

A good definition of 'justiciability' can also be found in Chris Finn, *The Concept of 'Justiciability' in Administrative Law in Groves & Lee, Australian Administrative Law* (2007): B

The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside its appropriate constitutional role. C

[67] The learned JC also correctly recognised the demarcation between what is justiciable and what is beyond the purview of the courts as explained by the decision of the Federal Court in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 where Zawawi Salleh FCJ, said as follows: D E

It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, inter alia, its justiciability. 'Justiciability' concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief. F

[68] In this respect what is to be considered is to look at the subject matter before the learned JC in determining the justiciability of the same and whether judicial review could be applied. G

[69] In the House of Lords case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, Lord Scarman said:

Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. H

[70] And in this case, it is also said by Lord Roskill as follows:

But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject matter of the prerogative power which is exercised. *Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review.* Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, *the dissolution of parliament* and I

appointment of Ministers as well as others *are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.* (Emphasis added.)

[71] The approach in looking at the subject matter has also been followed in Malaysia.

[72] In the Supreme Court authority of *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, where it states as follows:

> In our view such power is a power of high prerogative of mercy which is an executive act but *by its very nature* is not an act susceptible or amenable to judicial review (see *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935). (Emphasis added.)

[73] In *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 the Supreme Court said as follows:

> *In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter* and we find support for this view in the decision of the House of Lords in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 where Lord Scarman in his speech (at p 407) says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of Lord Roskill (at p 418) where he refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as inter alia that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process. (Emphasis added.)

[74] In coming to the decision that the proclamation and the dissolution of the SLA are not justiciable, both the High Court and this court are bound by the Federal Court case of *Chin Chee Kow* where it states as follows:

> There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, *the dissolution of parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.* (Emphasis added.)

[75] And as argued, other jurisdictions have also ruled such dissolution is not justiciable before the courts. A

[76] In Singapore, the High Court's case of *Lee Hsien Loong v Review Publishing Co Ltd & Anor and another suit* [2007] SGHC 24 points out as follows: B

> ... within the span of executive decisions that are immune from judicial review are those involving matters of *'high policy'*. This includes such matters as *dissolving parliament*, the conduct of foreign affairs, the making of treaties, matters pertaining to war, the deployment of the armed forces and issues pertaining to national defence. These are what the American courts call 'political questions' and the reasons underlying the deference accorded to the executive branch of government in such areas have been articulated in the cases I have referred to. (Emphasis added.) C

[77] In Canada, the Court of Appeal's case of *Black v Canada (Prime Minister)* 2001 CanLII 8537 states as follows: D

> Unquestionably, the granting of honours is the prerogative of the crown. The monarch is 'the fountain, parent and distributor of honours, dignities, privileges and franchises': Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: and the Relative Duties and Rights of the Subject* (London: Butterworths and Son, 1820), at p 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan, supra, observe at pp 18–19, appointments and honours is one area in which the prerogative power 'remains meaningful'. Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374; [1984] 3 All ER 935. In his speech in that case Lord Roskill said at p 418 that the modern exercise of the prerogative includes 'the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, *the dissolution of parliament* and the appointment of ministers as well as others ... (Emphasis added.) E F G

[78] Further, if a matter is found to be not justiciable, the decision making process leading to the non-justiciable matter should also be not justiciable. In this regard we are bound by the Federal Court's case of *Juraimi bin Husin v Pardons Board, State Of Pahang & Ors* [2002] 4 MLJ 529, where it is said: H

> The prerogative of mercy was amongst the powers that was not susceptible to judicial review because its nature and subject matter was such as not to be amenable to the judicial process (see p 537A-B, *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 and *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 followed. I
>
> *The effect of making the decision making process justiciable would have the same effect as having the decision itself justiciable. Consequently, any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable.*

A *Accordingly, the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the Federal Constitution, was not justiciable.* (Emphasis added.)

B **[79]** The appellants also argued based on the Sri Lankan Supreme Court's case of *Sampanthan & Ors v Attorney General & Ors* [2019] 5 LRC 29 that the courts have reviewed and quashed a decision to dissolve parliament. However this is distinguishable from the facts of our case as this is due to the fact that the Sri Lankan President's power to dissolve Parliament is limited by art 70(1) of the Sri Lankan Constitution which did not permit the President to dissolve
C parliament for a period of four and a half years unless the Sri Lankan Parliament had by a resolution passed by at least two-thirds of the members requested such a dissolution. Since the president did not comply with art 70(1), it was found that the dissolution was unlawful, null and void.

D **[80]** In the case before us, there is no such limitation placed on the first respondent and his discretion has been described as absolute. He is equipped by the Sabah Constitution to dissolve the SLA.

E **[81]** It is also with respect wrong for the appellants to rely on the case of *R (on the application of Miller)* to say prorogation is a subject justiciable before the courts. This is because prorogation is different from dissolution as was stated by the Supreme Court as follows:

F *Prorogation must be distinguished from the dissolution of parliament. The dissolution of parliament brings the current parliament to an end. Members of the House of Commons cease to be members of parliament. A general election is then held to elect a new House of Commons.* The government remains in office but there are conventional constraints on what it can do during that period. (Emphasis added.)

G **[82]** Besides, the House of Lords in *Council of Civil Service Unions* did not include prorogation as one of those prerogative powers, the exercise of which is not susceptible to judicial review.

H *The Federal Court's decision on the OS*

[83] As indicated, we are aware of the decision of the Federal Court in respect of the OS mentioned earlier. The leave questions narrated at para [28] above, which the first appellant obtained from the Federal Court are quite connected
I to the arguments in the present appeal.

[84] The leave questions granted by the Federal Court as seen, clearly show that the interpretation of art 7(1), 10(2) and 10(4) of the Sabah Constitution, as narrated earlier to be justiciable.

[85] Although we are aware that the decision making process leading up to the proclamation and dissolution of the SLA should also be non-justiciable based on the case *Juraimi bin Husin*, we should respect the Federal Court in granting leave in the OS action as stated. This is because the said provisions of the Sabah Constitution involve the decision making process to the proclamation and dissolution of the SLA. Though the dispute in that OS before the FC mainly concerns who ought to be the chief minister, the same provisions of the Sabah Consitution are being raised equally to argue against the proclamation and dissolution of the SLA.

[86] However, what is equally obvious is the fact a dissolution of a state assembly, in this case the SLA, is not justiciable. Therefore even though we agree with the appellants that the said provisions of the Sabah Consitution could be argued, litigated and determined for its effect and applicability in relation to the present appeal, this still would not assist the appellants in their argument before us. At the risk of repetition, it could not assist the appellants because at the end of the day, a dissolution of a state assembly is a non-justiciable subject and consequently not amenable for judicial review.

Arguable case

[87] It is trite that at the leave stage for judicial review, an applicant for the same would only need to show an arguable case and that the matter is not frivolous. The threshold is low at that stage for the applicant to prove there is basis for the judicial review and as long as there is some substance before the courts for further arguments, leave should be granted for the matter to be further litigated, deliberated and determined at the substantive stage (see the Federal Court's cases of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 and *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] 1 CLJ 130).

[88] For the present appeal, there can be no doubt that since the Federal Court had given leave for appeal in relation to the OS, some of the issues raised in the present appeal could not be unjusticiable. The Federal Court had been explicit in allowing questions of law to be argued for the appeal. These questions of law as seen at para [28] have a bearing and in fact related to the proclamation and dissolution of the SLA. For instance, with regard to the first question of law, the argument that awaits the Federal Court is whether art 7(1), read with art 10(4) and art 10(2) of the Sabah Constitution, confer a discretion on the Yang di-Pertua Negeri to:

(a) determine whether a validly appointed chief minister ceases to command the confidence of the majority of the members of the legislative assembly; and/or

(b) dismiss a validly appointed chief minister.

[89] That question of law particularly (a) above relates also to the issue on the proclamation and dissolution of the SLA, the core issue for the present appeal. This is because if the second respondent as the appointed chief minister losses the majority, would he still be in a position to request and advice for the issuance of the proclamation and dissolution of the SLA.

[90] The same could also be said with regard to the question of law as narrated earlier; must the YDPN exercise his discretion only when the chief minister concedes that he has ceased to command the confidence of the majority of the members of the state assembly. In relation to the proclamation and dissolution of the SLA, if the YDPN need not wait for the concession of the chief minister that he has lost the majority, should the former not have the discretion to issue the proclamation and dissolve the SLA.

[91] Hence there are questions and issues in the present appeal that could not be simply put aside by saying the same are not justiciable.

[92] In *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253 the Federal Court considered whether non-justiciability excluded judicial review of the exercise of purported disciplinary powers against members of the Perak state legislative assembly under Standing Order 72 of the Assembly's Standing Orders. That raised an issue as to the effect of art 72(1) of the Federal Constitution. The court held:

> It is perhaps necessary to resolve the question of justiciability of the orders sought by the applicants before proceeding any further. This is governed by art 72(1) ...
>
> In determining the scope of art 72(1) it must be remembered that in Malaysia the constitution is supreme. As Suffian LP said in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3 at p 113:
>
> > The doctrine of the supremacy of parliament does not apply in Malaysia. Here we have a written constitution. The power of parliament and of state legislatures in Malaysia is limited by the constitution, and they cannot make any law they please.

[93] It is further said:

> It follows that art 72(1) must be read as being subject to the existence of a power or jurisdiction, be it inherent or expressly provided for, to do whatever that has been done. The court is empowered to ascertain whether a particular power that has been claimed has in fact been provided for. The issues raised by the applicants are therefore justiciable.

[94] However, we should not lose focus on the core issue; are the proclamation and dissolution of the SLA justiciable? As we have explained earlier, this is not justiciable. Therefore even though the appellants had raised other issues which are justiciable, the core issue remains a non-justiciable subject.

Executive decision

[95] At para 41 of the appellants' written submission, it is conceded by the appellants that there are issues which are unsuitable for judicial determination. According to the appellants, these are mostly matters that are considered to lie within the exclusive province of executive decisions. Therefore it is incumbent to determine whether the proclamation and dissolution of the SLA are matters within the exclusive executive's determination that should not be disturbed by the courts and therefore not justiciable.

[96] It is not disputed there are case law that have decided based on the common law that the courts would not delve into matters considered entirely up to the executive or the legislature to come to the finality of its conclusion. the courts have refrained and not gone to enquire the legality and propriety of the judgment call in respect of exclusive executive or legislative actions.

[97] Such matters have been described as falling within the 'exclusive province of the executive' eg *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR 570 (CA) (Singapore). This is rightly so to recognise and respect the three branches of government in a functioning democracy. In the book *De Smith's Judicial Review* (8th Ed), 2018 it is stated:

> The principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. It is not for judges to weigh utilitarian calculations of social, economic or political preference.

[98] Likewise, the proclamation and dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. This is a matter that is best decided by the people directly involved in calling for the proclamation and dissolution of the SLA. The first, second and the fourth respondents, are the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. For practical reasons too, they would be in a much better position compared to the courts in making the call for the end of term for the SLA. The dynamics of politics are within their better grasps than the courts in deciding this. Hence, this is a matter not suitable and appropriate for its review before the courts.

[99] It has also long been recognised there are areas where the courts will not take on the issues brought before it. In the seminal case of *Council of Civil Service Unions* Lord Roskill explained as follows:

> But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. *Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.* The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. (Emphasis added.)

[100] In the same case, Lord Diplock said as follows:

> The reasons for the decision maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another — a balancing exercise which judges by their upbringing and experience are ill qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.

[101] However, we do accept the legality of the actions taken towards that twin purposes of issuing the proclamation and dissolving the SLA is a matter within the purview of the courts. This is so because of the decision by the Federal Court on the OS as explained earlier. Nonetheless, as indicated, we are of the considered view that the Proclamation and dissolution of the SLA on its own, are matters not justiciable.

Dismissing application at the leave stage

[102] We have already pointed out that the issue of the proclamation and dissolution of the SLA in itself could not be justiciable for determination. And in this regard, the learned JC is entitled to dismiss the application for judicial review even at the leave stage.

[103] This is correctly decided as the Federal Court in the case of *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 held as follows:

The issue of whether the decision of the first and/or second respondent was amenable to judicial review could be decided at the leave stage. It was not a requirement that the court should only decide on the issue after hearing all the evidence at the substantive motion for judicial review. There was no purpose for the High Court to grant leave for the purpose of investigation on a full inter partes basis, when the supporting documents exhibited by the appellant clearly showed that the appellant had no arguable case.

[104] Further, the Court of Appeal in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 states as follows:

So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, *eg proceedings in parliament.* (Emphasis added.)

Request or advice

[105] A contentious issue in this case is whether the letter sent by the second respondent to the first respondent for the dissolution of the SLA is merely a request and not an advice. For the sake of convenience, the letter is reproduced as follows:

MEMBUBARKAN DEWAN UNDANGAN NEGERI SABAH

Dengan segala hormatnya, perkara di atas adalah dirujuk.

Saya memohon kepada Tuan Yang Terutama untuk membubar dewan Undangan Negeri Sabah dengan serta merta.

lni adalah disebabkan keadaan politik di negeri Sabah pada ketika ini tidak lagi stabil dan diancam oleh pihak tertentu yang berniat untuk menjatuhkan kerajaan pimpinan Parti Warisan Sabah yang ada sekarang. Dengan keadaan ini, maka adalah sesuai kita kembalikan mandat rakyat negeri Sabah untuk memilih kerajaan baharu.

Justeru saya memohon supaya Tuan Yang Terutama Tun mempertimbangkan dan meluluskan pembubaran Dewan Undangan Negeri Sabah atas kuasa TYT di dalam Perlembagaan Negeri Sabah seperti di dalam peruntukan 10(1)(2)(b).

[106] Looking at the letter, there can be no doubt that the title of the letter is in reference to the dissolution of the SLA. While the second and fourth paragraphs of the letter clearly indicate the second respondent's request to the first respondent for the dissolution of the same. We are of the view that the third paragraph of the letter is in the form of an advice regarding the unstable political situation in Sabah that warrants the dissolution as reflected in the fourth paragraph of the letter.

[107] In view of what appears in the above, the letter is both a request and an advice from the second respondent to the first respondent in respect of the dissolution of the SLA.

[108] Although the letter made reference to a nonexistent provision of the Sabah Constitution, we do not think this is fatal and had affected the request and advice for the dissolution of the SLA.

[109] We agree that both under the principles of constitutional law and general law, it is the substance of the letter or document that matters and not its form. Under constitutional law, as Lord Diplock in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 said:

> But in applying constitutional law the court must look behind the label to the substance.

[110] Under general law, the Federal Court in *Subramanyam a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor* [2010] 2 MLJ 597 held that an erroneous reference to a legislative provision in a dismissal letter did not render as void the decision to dismiss the appellant. It states:

> In my judgment *the erroneous reference to the wrong regulation, namely, reg 38 instead of reg 37 of the said Regulations does not vitiate or invalidate the decision to dismiss the appellant.* On the whole I am of the view that no injustice has been occasioned. (Emphasis added.)

[111] While the Supreme Court of India in *N Mani v Sangeethan Theatre & Ors* [2004] 12 SCC 278 held as follows on the effect of an incorrect reference to a provision of law in a document that conveyed the decision of the decision maker:

> It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

[112] Further the Federal Court in *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794 held that the clerical errors in a document that carried the impugned decision was not sufficient to invalidate the decision because it did not in any way prejudice the appellant.

Provisions of Sabah Consitution affecting the present appeal

[113] As noted earlier, it could not be said that all the matters raised in the present appeal are non-justiciable. There are matters which are indeed within the scope of what could be argued and decided by the High Court and this

court, hearing the present appeal. The matters that are justiciable would be best highlighted and discussed according to the relevant provisions of the Sabah Consitution. These provisions are also of significance as it relate to the issue of the proclamation and dissolving of the SLA.

[114] First is art 6(3) of the Sabah Constitution that states as follows:

> The Yang di-Pertua Negeri shall appoint as Chief Minister a member of the legislative assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly ...

[115] We are of the view, this provision does not mean that the YDPN in the context of this case could not dissolve the SLA. It merely indicates that the YDPN should appoint a chief minister that enjoys majority support of the assemblymen. Indeed as will be explained below, the YDPN has absolute discretion in dissolving the SLA despite this provision.

[116] In fact, there are no provisions in the Sabah Constitution that make it a requirement for the first respondent to consider and apply art 6(3) before making a decision under art 21(2) of the Sabah Constitution to dissolve the LA as will be shown.

[117] Article 6(3) of the Sabah Constitution also does not confer a right for the first appellant to be appointed as the chief minister. In the case of *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, an application for judicial review was dismissed at the leave stage on the basis that the issues arising therefrom were non-justiciable, and this is explained as follows:

> Eligibility for appointment does not confer upon the applicant an entitlement to that appointment.

[118] In this regard, we agree with the contention that even if the first appellant was eligible to be considered as a chief minister by the first respondent, this does not confer any entitlement on the first appellant to such an appointment. Since there is no entitlement, this issue is therefore non-justiciable.

[119] The next provision of importance that is related to this issue is art 7(1) of the Sabah Consitution which states as follows:

> If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet;

[120] As seen there are three conditions in the context of the present case imposed by the provisions or there are three parts of this provision and these are as follows:

(a) if the chief minister ceases to command the majority;

(b) the YDPN agrees to the chief minister's request to dissolve the SLA; or

(c) in the event the YDPN disagrees to the dissolution, the chief minister and the Cabinet to tender their resignation.

[121] In the present case, the first two conditions have been satisfied, which meant that the third condition is irrelevant and inapplicable.

[122] The first condition is satisfied both by direct evidence of the loss of the majority and also by inference. The direct evidence comes in the form of all the appellants as Sabah State Assemblymen stating their wish that the first appellant be appointed the chief minister replacing the second respondent. There can be no doubt that all the appellants constitute sufficient number to unseat the second respondent as the chief minister. Inference can also be deduced that the second respondent has lost the majority support because if he stills has that support, he would not have requested for the dissolution of the SLA.

[123] The second condition is also met having regard to the fact that the first respondent had agreed to the dissolution of the SLA upon the request of the second respondent.

[124] Because the two first conditions are proven based on the facts of this case, this provision empowered the first respondent to dissolve the SLA.

[125] The next provision to consider is art 10(1) of the Sabah Consitution which states as follows:

> In the exercise of his functions under this Constitution or any other law, or as a member of the Conference of Rulers, *the Yang di-Pertua Negeri shall act in accordance with the advice of the Cabinet or of a member thereof acting under the general authority of the Cabinet, except as otherwise provided by the Federal Constitution or this Constitution;* but shall be entitled, at his request, to any information concerning the government of the State which is available to the Cabinet. (Emphasis Added.)

[126] As seen, though this provision of the Sabah Consitution requires the YDPN to act on advice, it also allows exception to this general rule. As will be seen in a short while, the YDPN can act on his own discretion without advice in certain circumstances in the context of this case.

[127] Thus, it would not be correct to say that the YDPN must in all circumstances only act on advice. A

[128] In this regard the next relevant provision to consider is art 10(2) of the Sabah Consitution that states as follows: B

The Yang di-Pertua Negeri may act in:

(a) the appointment of a Chief Minister;

(b) *the withholding of consent to a request for the dissolution of the Legislative Assembly.* (Emphasis added.) C

[129] Hence, in the context of the present case, as seen, the YDPN could refuse to dissolve the dissolution of the SLA if there is such request and he could base this refusal entirely on his discretion. However as indicated, in the present case, the YDPN had agreed to dissolve the SLA. D

[130] Nonetheless, the other provision illustrating the duty of the YDPN to act on advice is art 10(1A) of the Sabah Constitution which states as follows:

In the exercise of his functions under this Constitution or any other law or as a member of the Conference of Rulers, where the Yang di-Pertua Negeri is to act in accordance with the advice or on advice, the Yang di-Pertua Negeri shall accept and act in accordance with such advice. E

[131] Further, the provisions of arts 10(3) and (4) further drive the point that the YDPN must need to act on advice. These respectively are as follow: F

(3) The Legislature may by law make provision for requiring the Yang di-Pertua Negeri to act after consultation with, or on the recommendation of, any person or body of persons other than the Cabinet in the exercise of any of his functions except — G

(a) functions, exercisable in his discretion; and

(b) functions with respect to the exercise of which provision is made in the Federal Constitution or any other Article of this Constitution. H

(4) For removing of doubts, it is hereby declared that clause (1) of this Article or otherwise clause (3) of this Article shall have effect and force on the Yang di-Pertua Negeri in performing any of his functions under this Constitution or any other law; and the Yang di-Pertua Negeri may use his discretion only when performing his functions under clause (2) of this Article and no other. I

[132] The issue that has arisen in this case is that since the first respondent as YDPN must act on advice, any advice whatsoever could not come from the second respondent in dissolving the SLA as on 29 July 2020 when the letter was

written to the first respondent, the second respondent was no longer the chief minister, having lost the majority support of the state assemblymen.

[133] We agree with the submission of the appellants on this point. Since the second respondent had lost the majority support in the SLA, the second respondent was no longer the chief minister to render any advice to the first respondent including to dissolve the SLA. Though there can be no dispute that the second respondent is in any event the caretaker chief minister with the dissolution of the SLA but that under no circumstances would allow the second respondent to advice the first respondent in any major decisions and undertakings that may be required.

[134] But despite agreeing with the appellants on this point, the fact remains that the second respondent could still rely on art 7(1) of the Sabah Constitution which have been alluded earlier to request for the dissolution of the SLA.

[135] Besides, we have already explained why the letter dated 29 July 2020 from the second respondent to the first respondent must also be viewed as a request and not merely an advice. Because it is also a request, the second respondent was perfectly entitled to ask for the dissolution of the SLA from the first respondent. Under art 7(1) of the Sabah Constitution, as shown, such request can be made for the dissolution.

[136] It is also relevant to note that art 21(2) of the Sabah Constitution allows the YDPN to dissolve the SLA and this provision states as follows:

> The Yang di-Pertua Negeri may prorogue or dissolve the Legislative Assembly.

[137] The above is similar to art XXXVI(2) of the Perak State Constitution. And the Federal Court in the case of *Dato' Sri Ir Hj Mohammad Nizar bin Jamaluddin* explains the application of this provision in relation to the absolute discretion of His Royal Highness the Sultan of Perak ('HRH') on the dissolution of the Perak Legislative Assembly ('LA') as follows:

> It is important to note that in all cases, *the decision whether or not to dissolve the LA is in the absolute discretion of HRH.* HRH does not act on advice of the executive council in the matter of dissolution of the LA. (Emphasis added.)

[138] Also of significance is the finding by the Federal Court in this case as follows:

> In this regard we would, however, add that *the power to dissolve the LA is vested in HRH by art XXXVI(2) no matter in what circumstances it was made.* (Emphasis added.)

[139] Therefore following the above case, the YDPN could dissolve the SLA in any circumstances based on his absolute discretion including as in this case, upon the request of the second respondent.

[140] A point of contention by the appellants in respect of the above provision is that since the first appellant had obtained majority support in the SLA, did the first respondent sufficiently consider appointing the first appellant as chief minister instead of dissolving the SLA. On this issue, the fact remains that absolute discretion is given for the first respondent to dissolve the SLA. That in itself would mean that he had the option not to consider the appointment of the first appellant as chief minister. He is at liberty to choose between the two and he could legally on his own discretion ignore the other alternative.

[141] Besides at what point in time could it be said that the first respondent did not sufficiently consider the appointment of the first appellant as chief minister instead of dissolving the SLA. The two options are well before him based on the provisions highlighted in the Sabah Constitution. To simply imply and insinuate that he may not have sufficiently considered appointing the first appellant as chief minister, wrongly amounts to saying he is oblivious to the options before him in the face of the clear provisions in the Sabah Constitution and legal advice from the State Attorney General or others available at his disposal as the Head of State.

[142] Indeed the absolute discretionary power of the YDPN in this respect has already been pointed out by the case *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di- Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* [1986] 2 MLJ 391. This case also makes no distinction whether the dissolution was pursuant to a request or advice. This case states as follows:

> *In the court's humble view the application of the applicant in substance is really questioning the acts or would-be acts of the second defendant as head of a State Government and against the first defendant in respect of his powers under the Constitution vis a vis that Government.* Under s 29(2) of the Government Proceedings Ordinance, 1956, no court shall grant an injunction or make any order against an officer of the Government (which includes a minister) if the effect of granting such an injunction or such an order would be to give any relief against the government which would not have been obtained against the government.
>
> *... even if advice is tendered to the first defendant to have the state assembly dissolved other than under art 7 of the State Constitution the first defendant is vested with a discretion to order dissolution or not under art 21(2) read with art 10(2) thereof. Where the constitution itself had invested the first defendant with that discretion the court held that it was extremely improper that it should interfere by means of an injunction. Such an injunction would certainly run counter to the spirit of art 21(2) and read with art 10(2) thereof.* For this reason the court held that it had no jurisdiction to grant an

A injunction in the circumstances asked for that would interfere with the first defendant's exercise of his discretion. (Emphasis added.)

B **[143]** We also are in agreement with the contention that the discretion exercised by the first respondent is similar in nature to the discretion provided to the Attorney General of Malaysia in the exercise of his prosecutorial powers pursuant to art 145(3) of the Federal Constitution which states:

C The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial.

D **[144]** In this regard, the courts have consistently held that such discretion is beyond the scope of judicial review (see *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, *Khairuddin bin Abu Hassan v Tan Sri Mohamed Apandi Ali (sued in his capacity as the appointed 'Attorney General')* [2017] 9 MLJ 441 and *Datuk Mohd Zaid bin Ibrahim v Peguam Negara Malaysia* [2017] 9 MLJ 502).

E **[145]** A note of caution is appropriate at this stage. We have given our interpretations regarding the provisions of the Sabah Constitution as seen above. In giving the interpretations, we are aware of the appellants' argument that these are matters that should be litigated only at the substantive stage of the judicial review and not now. But we are interpreting these provisions only to
F show that in any event, it still leads to the issue of the proclamation and dissolution of the SLA, which in itself is not justiciable. Further, these are matters where the Federal Court as pointed earlier, had given leave for arguments. These matters, separate from the issue of the proclamation and dissolution of the SLA, are therefore justiciable.

G CONCLUSION

[146] The decision by the learned JC to dismiss the application for judicial review even at the leave stage on the ground that the proclamation and the
H dissolution of the SLA are not justiciable, are supported by cogent authorities.

[147] Although there are other issues as highlighted that are justiciable before the courts, the Proclamation and dissolution of the SLA in itself are
I non-justiciable.

[148] By the provisions of the Sabah Consitution too the YDPN has absolute discretion to dissolve the SLA.

[149] Based on all the reasons explained, the appeal is dismissed. We make no order as to costs as this is a matter of public interest. A

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh B

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